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In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL MULDOON ELDER,
d/b/a VORPAL GALLERIES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer violated Section 8(a)(1) of the National Labor Relations Act by discharging 11 employees for engaging in a strike.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 51-52) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. 59-105) are reported at 227 N.L.R.B. 446. An order clarifying the Board's decision and order (Pet. App. 55-58) is reported at 228 N.L.R.B. 485.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10-17) was entered on August 6, 1980. The petition for a writ of certiorari was filed on October 31, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are reprinted at Pet. App. 1-3.

STATEMENT

Petitioner operates art galleries in several cities. At the San Francisco gallery, the only one involved in this proceeding, during the relevant period the employees were salaried and were paid twice a month. They were frequently paid late, especially in 1974 and 1975 when the gallery's business declined. In 1975, the employees were paid late on 13 separate occasions. In January 1976, a health insurance plan, instituted a few months earlier, was canceled because petitioner failed to pay the premiums (Pet. App. 74-76).

That same month, the employees (who were not represented by a union) met to discuss the late payments and the cancellation of the insurance plan. They spoke to petitioner on several occasions but no agreement was reached. On January 10, 1980, 11 employees stopped working and went on strike. On January 15, they began peaceful picketing in front of the gallery and continued for about ten days (Pet. App. 76-79). On January 23, all 11 striking employees were notified that " '[w]ith everything that has occurred, it is clear that Vorpal Gallery, San Francisco, has been radically overstaffed. * * * Therefore, you should consider yourself laid off * * *' " (Pet. 5-6; Pet. App. 80). The gallery continued to operate, subcontracting some of its work and arranging for the remainder to be performed by non-striking employees, by three newly-hired employees, and by two strikers who were recalled (Pet. 7-8; Pet. App. 90-92).

In findings upheld by the Board (Pet. App. 60), the administrative law judge determined that petitioner discharged the 11 striking employees because of their participation in the strike (Pet. App. 86-87, 94-95), and rejected petitioner's contention that the discharges were occasioned by economic necessity (Pet. App. 92-93):

> [T]here was little change at the gallery after the strike and layoff. The overhead possibly was decreased (although this was not shown), but there is no indication that there was any change adequate to rescue the business from the insolvency [General Manager] Downing claimed to

> have existed.[10] * * * In any event, the burden of proving financial motive was [petitioner's] burden. No financial statement or other convincing proof of financial condition was offered. The burden not having been met, this defense is not accepted.

[10] Insolvency was not established and probably did not exist.

The court of appeals found the Board's decision to be supported by "substantial evidence" (Pet. App. 51-52), noting that all of the strikers had been discharged even though by petitioner's own admission there was no financial need to terminate that many employees. "While the case is a close one, this, together with other evidence, is sufficient to uphold the Board" (*id.* at 52).

ARGUMENT

Petitioner urges (Pet. 13) that in view of his "proper" economic motive for "plac[ing the] strikers on layoff," it was improper for the Board "to rest a finding of unfair labor practice upon the proposition that the employer was also angry with the strikers * * *." However, the Board found petitioner's defense of economic necessity "to be unsupported by the record" (Pet. App. 90), and the court of appeals affirmed. Thus, the issue here is not what standard should be applied when there exist both good cause and an unlawful one for the discharge,[1] but instead

[1] Petitioner correctly notes that there is a conflict among the circuits as to the standard to be applied in discriminatory discharge cases where there is evidence that an employer had both proper and improper motives for the discharge. As

whether substantial evidence supports the Board's finding that the employees were discharged because of their protected strike. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the Board's finding is amply supported by the record. Petitioner Elder, the owner of the gallery, admitted that without the strike he would not have laid off the employees until later (Pet. App. 8). He also admitted that as a result of the strike

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demonstrated above, the Board found no such dual motive here.

On August 27, 1980, the Board issued a decision and order in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. No. 150, in which it reconsidered its traditional test for determining whether an employee discharge violates the Act, and reformulated it to conform to this Court's analysis in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Thus, the Board announced in *Wright Line* that henceforth it will apply the following test in discharge cases (slip op. 20-21):

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected [employee] conduct was a "motivating factor" in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the [discharge] would have taken place even in the absence of the protected conduct. [Footnote omitted.]

The Board indicated its intention to apply the new test to both "pretext" and "dual motive" cases (slip op. 20 n.13). Had that test been applied here, the outcome would have been no different. The facts on which the Board relied (see pages 2-3, *supra* and text and page 5, *infra*) established a prima facie case of discrimination, and the Board properly rejected petitioner's assertion that the discharges would have occurred in any event because of economic considerations.

he decided to "clean the slate" by terminating all the strikers and then rehiring some of them, instead of laying off only those employees in excess of the number needed (Pet. App. 5). Moreover, all striking employees were terminated and all non-striking employees retained. In addition, after the strikers were discharged, petitioner hired three new employees who performed work previously done by strikers. Meanwhile, most of the strikers were never offered reinstatement. These facts warrant the conclusion that petitioner was seeking to retaliate against the strikers rather than simply to reduce an oversized staff.

2. Petitioner's argument (Pet. 27-28) that the case should be remanded to the Board for consideration of the gallery's financial statements is not properly before this Court. The relevant financial statements related to a period ending in January 1976 when the strikers were discharged. Petitioner has never contended that the documents were not available between that date and December 20, 1976, when the Board issued its Decision and Order in this case.[2] Under Section 102.48(d)(1) of the Board's Rules and Regulations (29 C.F.R. 102.48(d)(1)),[3] the petition-

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[2] Petitioner notes (Pet. 27) that his accountant's affidavits concerning the financial statements did not exist until early 1980. However, nowhere in the affidavits (Pet. App. 39-50) or in petitioner's other submissions is there a suggestion that the financial statements themselves did not exist in 1976.

[3] This section provides, in pertinent part:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.
>
> * * * * *
>
> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not

er could have moved to reopen the record even after issuance of the Board's Decision and Order to adduce newly discovered or previously unavailable evidence. It did not do so. Accordingly, the contention that the Board should now consider the statements is barred by Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).[4] *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *Cascade Employers' Ass'n* v. *NLRB*, 404 F.2d 490, 492 (9th Cir. 1968).

Moreover, the Board's application for enforcement of its order was filed in the court of appeals on May 17, 1977. The court did not issue its decision enforcing the Board's order until April 30, 1980. At no time during this period of nearly three years did petitioner apply to the court for leave to adduce additional evidence as authorized by Section 10(e) of the Act; it did so only after the court decided the case in the Board's favor. The belated motion to augment the record to include the financial statements, and the accompanying petition for rehearing, were denied by the court of appeals without comment (Pet. App. 20, 33). Ordinarily, this Court does not consider issues neither raised in nor decided by the court of appeals (see *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)), and does not address

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presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

[4] Section 10(e) is reprinted in full at Pet. App. 1-3. The relevant portion reads: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused."

questions raised belatedly in a petition for rehearing unless they are actually decided by the court below (see *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935); cf. *Garner* v. *United States*, 424 U.S. 648, 656 n.10 (1976) (declining to pass on contentions "not deemed of sufficient merit to warrant discussion below")). Review of a refusal to remand for consideration of additional evidence would be particularly inappropriate where, as here, petitioner chose to stand on the existing record, and sought to adduce additional evidence only after it lost at the administrative level and on appeal. See *Partenweederei, MS Belgrano* v. *Weigel*, 313 F.2d 423, 424-425 (9th Cir. 1962); *Local No. 1505, IBEW* v. *Local Lodge No. 1836, IAM* 304 F.2d 365, 368 (1st Cir. 1962), vacated as moot, 372 U.S. 523 (1963); *Jones* v. *Zurich General Accident & Liability Ins. Co.*, 121 F.2d 761 764 (2d Cir. 1941).[5]

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[5] In any event, the motion to augment the record was properly denied because the evidence at issue could not have changed the result in this case and was therefore not "material" within the meaning of Section 10(e). *NLRB* v. *Mexia Textile Mills*, 339 U.S. 563, 569-570 (1950). At most, the evidence would show the existence of economic reasons for terminating some employees. However, it is clear that the court of appeals enforced the Board's order not because no justifiable ground for terminating employees existed, but because substantial evidence (summarized at pages 4-5, *supra*) supported the Board's finding that the employees' protected strike activity was the moving cause of their discharge, and because in the absence of the strike the discharge would not have occurred. See note 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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